

**On how the chicken sometimes can come before the  
egg, and on the structuring of an international  
humanitarian argument  
-a koskenniemiian reading of the Tadic-case**

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# 1 Introduction

## 1.1 On the relevance of poultry

Throughout history, there has been an ideal that legal norms should exist before they are imposed on their subjects. With the evolvement of society, this ideal has become increasingly more present. It is one of predictability and by following this ideal, lawmakers have been able to better legitimize the imposition of their desired norms. For instance, basic formal demands to legislation, such as prohibition against retroactive legislation, derive from this ideal. However, while at what may be considered to be the peak of modern civilization, a strict understanding of this ideal may prove to obstruct the evolution of international law and the quest for a better world. International law has in the latter part of the 20<sup>th</sup> century developed from comprising a select amount of treaties into a vast dynamic area of law, concerning itself with a considerable amount of aspects that previously belonged to the realm of domestic law. A significant part of this development has been the achievements of the United Nations (UN), typically in relation to the introduction of novelties<sup>1</sup> such as humanitarian law.

It is principally with relation to international humanitarian law that the parallel to the chicken and the egg, as contained in this thesis' title, shows its relevance. There has long been a logical belief that the egg existed before the chicken. This logic is based on the observation that every chicken is hatched out of an egg. From a domestic legal perspective, the egg could be considered as the formal demand to a norm's legal foundation, while the chicken could serve as the imposition of the norm. By having knowledge of the egg, one would also have to recognize the possible existence of the chicken. Similarly, in penal law,

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<sup>1</sup> Koskeniemi (2005), p. 210.

the same reasoning lies behind the principle of *nulla poene sine lege*<sup>2</sup>. The legal subjects of a State would have to recognize the possibility of punishment for breaking criminal norms that have been implemented into a State's written laws.

However, in international humanitarian law, it might prove difficult to define an egg (formal demand to norm). A common dilemma in newer and dynamic areas of international law, such as international humanitarian law, is that the speed with which substantive law develops supersedes that of formal legislative processes such as the making and amendment of treaties. It is noteworthy that in international humanitarian law, the substantive law has primarily been developed through the jurisprudence of international criminal tribunals. Until 2002 international criminal tribunals were impermanent tribunals set up to decide in cases of international criminal responsibility.<sup>3</sup> Implicit in international criminal responsibility lies violations of international humanitarian law. Two claims have often been raised against the tribunals from the side of the Defence; it is argued that they lack both jurisdiction and substantive foundation.<sup>4</sup> Both objections refer to that the formal demands to norms in international law are unfulfilled. In reference to our parallel, this could be rephrased to a claim that *the chicken does not exist as there is no egg*.

Since it is evident<sup>5</sup> that international criminal tribunals have enforced the norms of international humanitarian law, with questionable jurisdiction and material foundation to do so, we can consider *the chicken's existence without the egg*. Yet, from a logical perspective there must be an egg. So the problem with acknowledging the egg's existence may primarily lie in how to define it. In other words, an egg could be defined in different ways, depending on the viewer's perspective and premises for defining it. Similarly, it will be

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<sup>2</sup> Latin for *No punishment without the existence of a law*.

<sup>3</sup> A permanent international criminal court was founded July 1. 2002, by the Rome Statute of the International Criminal Court. The Rome Statute is an international treaty and binds only States that formally express their consent to be bound by its provisions.

<sup>4</sup> E.g. *Prosecutor v. Joseph Kanyabashi* and *Prosecutor v. Slobodan Milosovic*.

<sup>5</sup> E.g. *Prosecutor v. Joseph Kanyabashi* and *Prosecutor v. Dusko Tadic*.

argued here that international law is regarded upon and argued from several different perspectives. For instance, a professor of political science would define international law and its sources based on different premises than a professor of law. In relation to international humanitarian law, the formal demands to norms may be weaker due to a change in perspective on how to view the different sources that comprise international law.

According to Martti Koskenniemi, a professor of international law, a study of the argumentative practice in international law reveals that there are four general perspectives from which to perceive international law: *The rule-approach, the policy-approach, the skeptical position and the idealist position*. His claim is found in his treatise “From Apology to Utopia”<sup>6</sup>, which will be introduced in detail below. These four general perspectives are referred to as modernist doctrines.<sup>7</sup> One of these doctrines, *the idealist position*, is claimed to be representative of the argumentative practice in international humanitarian law.<sup>8</sup> If this is the case, one will have a perspective from which to understand the structuring of an international humanitarian argument.

My aim with this thesis is to prove *whether or not the idealist position’s perspective on international law corresponds with the argumentative practice in international humanitarian law*, or in reference to our parallel: *to understand where the chicken comes from*.

## 1.2 On choice of sources

My thesis is inspired by Koskenniemi’s “*From Apology to Utopia*”<sup>9</sup>. Originally written in 1989, and reissued in 2005 with a new epilogue, “*From Apology to Utopia*” has received status as an epic of international legal literature<sup>10</sup> due to its thorough evaluation of

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<sup>6</sup> Koskenniemi (2005).

<sup>7</sup> Koskenniemi (2005), p. 182.

<sup>8</sup> Koskenniemi (2005), p. 210.

<sup>9</sup> Koskenniemi (2005).

<sup>10</sup> E.g. German Law Journal No. 12 (1 December 2006).

international law and what he refers to as *modernist doctrines*. *Modernist doctrines* are alternative positions from which to understand international law. The author himself claims to represent a *postmodernist* approach to international law. This implies deconstructing the modernist doctrines through analysis, illustrating the inconsistency of modernist argumentation and relativity of international law. While his *postmodernist* approach shall not be pursued in this essay, his findings in “*From Apology to Utopia*” will prove valuable in order to understand the content of the different modernist doctrines generally and the idealist position in particular.

Furthermore, my method for analyzing the chosen data draws inspiration from Koskenniemi. By a *koskenniemiian* reading of the chosen data, as contained in this thesis’ title, I refer to emphasizing on argumentative structures rather than substantive content.

My choice of data is a significant decision by the International War Tribunal for the Former Yugoslav Republic [ICTY], *Prosecutor v. Dusko Tadic [Tadic case]*.<sup>11</sup> Decided in 1995, the Tadic case concerned the determination of international criminal responsibility of Dusko Tadic for crimes he allegedly committed in the Prijedor region of Bosnia-Herzegovine between May and August 1992. Tadic was accused of rape, unlawful killing, torture and cruel treatment.<sup>12</sup> The case has been chosen since it is regarded as the most principled decision delivered by the ICTY. The since the Tadic case was the first fully contended case before the ICTY. Notwithstanding that international criminal courts do not follow the binding force of precedent, the Tadic decision is still referred to by the ICTY and other international criminal courts, such as the ICTR, when opposed by similar contentions as in the Tadic case<sup>13</sup>. This implies that the arguments made by ICTY in the Tadic case are acknowledged in later decisions by the ICTY and other international criminal courts. As international humanitarian law is primarily practiced authoritatively through the decisions of international criminal courts, this acknowledgement suggests, it is

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<sup>11</sup> *Prosecutor v. Dusko Tadic (IT-94-I)*.

<sup>12</sup> *Prosecutor v. Dusko Tadic, First Amended Indictment*

<sup>13</sup> E.g. *Prosecutor v. Joseph Kanyabashi*.



asserted here, that argumentative structures found in the Tadic case will be identifiable with and common within international humanitarian law. Thus, these structures will be *typical* to international humanitarian law and will be tried against my four hypotheses. By *typical* structures, I refer to argumentative structures that generally are identifiable within one area of law. By *structures*, I refer to how and on which premises an argument is built up; and by an *argument*, I refer to a set of structures that result in a final position.

### 1.3 On the structure of the present thesis

The dissertation is divided into three main parts. The first chapter will present general traits of an international humanitarian argument, as found in an analysis of *Prosecutor v. Dusko Tadic*.<sup>14</sup> This will be a presentation of *data*. The second chapter will consist of a presentation of four modern doctrines on how to perceive international law and their general traits. This will be a presentation of four different *hypotheses*. The general traits of an international humanitarian argument (*data*) will, in the third chapter, be compared with the general traits of the four doctrines (*hypothesis*). On the basis of this comparison, I will conclude on whether the idealist doctrine dominates the application of international humanitarian law.

As will be further explained under section 1.4, my dissertation follows a method much inspired by the method of natural sciences. By following this method, I am dependent on operating with comparable *data* and *hypotheses*. In order to achieve this, both *data* and *hypothesis* are expressed as mathematically as possible. This is achieved by operating with *general traits*. Each general trait has a certain recognizable content. Both *data* and *hypothesis* are expressed by a list of general traits. These lists will follow the presentation of data (section 2.7) and the presentation of each hypothesis (sections 3.1.2.2, 3.1.3.2, 3.1.4.2 and 3.1.5.2), and will serve as basis for comparison in section 4 thus providing the dissertation with a transparent structure.

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<sup>14</sup> *Prosecutor v. Dusko Tadic*.

## 1.4 On method

In choosing a method, focus has been kept on creating a method that best allows me to outline structural patterns of international humanitarian argumentation and to link these with an international legal doctrine. With this focus, I have found it useful to apply a method much inspired by the methods used in natural sciences. In more specific terms, I have based my method on basic *induction* and *deduction*. By *induction*, I refer to generalizing international humanitarian argumentative traits from the practice of international criminal tribunals.<sup>15</sup> *Deduction* refers to evaluating my thesis by comparing hypothesis with data.<sup>16</sup>

By choosing this method, an approach transpires that bears similarity to a traditional legal method, where a rule is found through induction (extracting a rule from different sources) and applied by deduction (the rule is compared on the facts of a situation). The traditional legal method in this respect shares considerable aspects with the method of natural sciences, which in its essence is pure math. This is due to the fact that all sciences are attempts to analyze and give order to the perceived world, e.g. in biology with focus on all living organisms and in law with focus on the norms that regulate society.

When comparing the argumentative structures of the doctrines with those found in the analysis, it might prove difficult to find a complete match. This is a common problem within natural sciences. This problem is solved by awareness of potential weaknesses connected to experiments (where a thesis is either proved or abandoned) and an acknowledgement of the minor probability of a 100 percent match between thesis and data. Instead it is commonly operated with a minimal demand to the probability of the thesis being correct. The probability is calculated by comparing the desired match with the actual match and the minimal demand to probability increases with the amount of data gathered.

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<sup>15</sup> "induction." Encyclopædia Britannica. 2008. Encyclopædia Britannica Online. 12 Nov. 2008 <<http://search.eb.com/eb/article-9042354>>.

<sup>16</sup> "deduction." Encyclopædia Britannica. 2008. Encyclopædia Britannica Online. 12 Nov. 2008 <<http://search.eb.com/eb/article-9029720>>.

My thesis is likely to meet similar obstacles. I do not expect to find a 100 percent match between the general structural traits extracted from the different doctrines and the traits found in the analysis. First of all, by extracting general structural traits from the different modern doctrines, I will exclude other relevant structures that can be found in the analysis. Furthermore, I do not expect to be able to see all relevant structures in the material analyzed. This will be taken into consideration in my conclusion together with showing awareness of the limited amount of data gathered. A minor probability of my thesis being correct will not necessarily disprove my thesis. It may just as well be the result of inaccuracy of or a limited set of data.

In the legal sciences, it is not usual to operate with a rate of probability in the same manner as is seen in the natural sciences. Instead, one chooses the understanding that is or appears to be most reasonable. Reasonableness is a relative concept, and not easy to convert into figures. However, in most cases, a reasonable understanding of arguments *de lege lata* could be converted into a probability that exceeds 50 percent. This must be seen in relation to the need of order in law. Natural sciences operate with minimum 5 percent demand to probability. Considering the weaknesses connected with generalizing argumentative structures, it seems too rigid to operate with a minimal demand of 50 percent. In this relation, I find that the bar to keep my thesis should be placed to the lower minimal demand of 5 percent, whilst operating with a minimal demand of 50 percent to prove my thesis. These preliminary observations on method will prove more understandable as the thesis unfolds.

### 1.5 On my position

I aim to keep an objective position throughout the essay. To be more specific, I will try to avoid judging the correctness of the different doctrines or the argumentation of the ICTY. Such judgment is irrelevant when considering that my aim with the thesis is to prove the relevance of an idealist doctrine in international humanitarian law. However, it should be emphasized that no position is truly objective. I acknowledge that my choice of sources and

my analysis of the Tadic case will somehow be influenced by a variety of factors, including my background from domestic Norwegian law. My background leads me to consider my initial position to international law as close to the rule-approach. Similarly, it also makes me familiar with many of the thoughts and ideas behind the idealist position.

## **2 General traits of an international humanitarian argument**

By making use of a *koskenniemi*<sup>17</sup> analysis of *Prosecutor v. Dusko Tadic*, I have identified six general traits of an international humanitarian argument. In the following, each acclaimed argumentative trait will be presented with reference to my findings from the analysis. A final summary of the general traits will serve as comparative data to the different hypothesis that will follow in chapter three.

### **2.1 Operating with a wide scope of international legal sources**

#### **2.1.1 Claim**

The main substantive legal question that arose in *Prosecutor v. Dusko Tadic* was a question of jurisdiction.<sup>18</sup> The tribunal [*the ICTY*] had been given jurisdiction through Statutes given by the UN Security Council. It was primarily Articles 2 and 3 of the Statutes that regulated the question of jurisdiction, and thus constituted the substantive law on the basis of which the tribunal had to decide whether it had jurisdiction to decide the substance of the dispute.<sup>19</sup> The discussion on Article 2 concerned the tribunal's "*power to prosecute persons committing or ordering to be committed grave breaches of the Geneva*

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<sup>17</sup> See section 1.2.

<sup>18</sup> *Prosecutor v. Dusko Tadic*, premise 8.

<sup>19</sup> See Appendix A to view the content of Article 2 and 3 of the Statute.

*Conventions*”.<sup>20</sup> The substantive legal question regarding Article 2 was whether the reference to *grave breaches of the Geneva Conventions* restricted the tribunal’s jurisdiction to international armed conflicts.<sup>21</sup> With regards to Article 3, the discussion concerned the tribunal’s “*power to prosecute persons violating the laws or customs of war*”.<sup>22</sup> This discussion was concentrated on the substantive legal question of whether the *laws or customs of war* only applied in international armed conflicts.<sup>23</sup>

One would assume, while considering the substantive questions at hand, that the tribunal gave relevance to a restricted amount of sources. However, the tribunal gave a wide range of sources relevance in its interpretation of Articles 2 and 3. That the tribunal in *Prosecutor v. Dusko Tadic* gave relevance to such a variety of sources, leads me to the following claim: *The tribunal regarded international law to have a wide substantive scope.*

### 2.1.2 Findings supporting the claim

In its interpretation of Article 2 of the ICTY statute, the tribunal undertook both a contextual and a teleological interpretation of the provision’s literal content.<sup>24</sup> In addition to the Statute itself, statements by the UN Security Council on the establishment of the ICTY constituted the main legal sources. However, the tribunal gave the following other sources relevance in its argumentation: An Amicus Curiae Brief submitted by the U.S.A., indications in the provisions of the German Military Manual, the fact that the conflicting parties in Bosnia-Herzegovina chose to implement the law of the 1949 Geneva Conventions on limiting the barbarity of war into their conflict and a decision by the Danish High Court.<sup>25</sup>

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<sup>20</sup> ICTY Statutes, Article 2

<sup>21</sup> *Prosecutor v. Dusko Tadic*, premise 65

<sup>22</sup> ICTY Statutes, Article 3

<sup>23</sup> *Prosecutor v. Dusko Tadic*, premise 65

<sup>24</sup> *Prosecutor v. Dusko Tadic*, premises 71-85.

<sup>25</sup> *Prosecutor v. Dusko Tadic*, premise 83.

The Statute and statements by the Security Council also constituted the main sources in the tribunal's reading of Article 3. However, in order to further strengthen its argument that it indeed had jurisdiction to decide in the case, the tribunal additionally emphasized statements from specific members of the Security Council to support their interpretation.<sup>26</sup> This was done to illustrate that the tribunal's understanding of Article 3 was "*borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal*".<sup>27</sup> Implicitly, the statements were used to prove that the tribunal's understanding of Article 3 was in harmony with the opinion of the States that gave the tribunal its statutes. That the declarations were given decisive weight, is well illustrated by the following statement from the tribunal: "*Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law*".<sup>28</sup>

In its reading of Article 2 as well as Article 3, the tribunal gives relevance to a wide range of sources.

## 2.2 Applying resolving generalities

### 2.2.1 Claim

In its essence, the structuring of argumentation in the Tadic case has one only purpose; to promote the application of resolving generalities. The structuring of argumentation follows one pattern: A new understanding is interpreted into traditional texts by differentiating between different aspects of the text and expressing doubt about its content, only to perceive it in the light of more abstract sources and find the text to have an abstract content.

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<sup>26</sup> *Prosecutor v. Dusko Tadic*, premise 88.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

That the tribunal follows this argumentative pattern, leads me to the following claim: *The tribunal applies resolving generalities.*

In order to prove this, a presentation of the structuring of argumentation in *Prosecutor v. Dusko Tadic* will follow below.

### 2.2.2 Findings supporting the claim

The tribunal started its literal interpretation of Article 2 of the Statute by creating doubt about its literal understanding.<sup>29</sup> This was done by differentiation, i.e., by introducing two possible understandings of the provision, one giving the tribunal wide jurisdiction [ $Ax$ ] and another giving it narrow jurisdiction [ $Ay$ ].<sup>30</sup> The literal doubt enabled the tribunal to seek further guidance about the understanding of Article 2 in other sources.<sup>31</sup>

The tribunal found further guidance first by examining the “*object and purpose*” of the Statute, emphasizing the political motives for its enactment.<sup>32</sup> In this way, the tribunal found support for the most ideal of the two possible literal understandings of Article 2 in terms of achieving wide jurisdiction ( $Ax$ ).<sup>33</sup>

By examining the “*object and purpose*” behind the Statute, the tribunal introduced arguments against choosing an understanding of Article 2 that gave the Tribunal narrow jurisdiction ( $Ay$ ). The first argument was based on the difficulty of applying  $Ay$  on the factual situation, which the tribunal described as chaotic.<sup>34</sup> The second argument was based on that the legislative organ that enacted the Statutes did not specify how Article 2 should

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<sup>29</sup> *Prosecutor v. Dusko Tadic*, premise 71.

<sup>30</sup> Ibid.

<sup>31</sup> *Prosecutor v. Dusko Tadic*, premise 72 onwards.

<sup>32</sup> *Prosecutor v. Dusko Tadic*, premises 72-78.

<sup>33</sup> *Prosecutor v. Dusko Tadic*, premise 78.

<sup>34</sup> *Prosecutor v. Dusko Tadic*, premise 73.

be understood.<sup>35</sup> Passivity was emphasized as support for the latter argument.<sup>36</sup> Another argument opposing *Ay* was dubbed as “*logical*” and presented *Ay* as a *reductio ad absurdum*:<sup>37</sup> A type of logical argument where one assumes a claim for the sake of argument and derives an absurd or ridiculous outcome, and then concludes that the original claim must have been wrong as it led to an absurd result.<sup>38</sup> The presentation of *Ay* as *reductio ad absurdum* was based on other premises than what was advocated by the counsel for Mr. Tadic’s Defence.<sup>39</sup>

The deductio ad absurdum was, it might be said, used as a diversion, and it was followed by a temporary conclusion on the preference of *Ax*.<sup>40</sup> The tribunal thus diverted attention from the poor substantive basis for *Ax*.

Hence, the Tribunal found a disharmony between *Ay* and its findings in the other sources.<sup>41</sup> This lead the Tribunal to undertake a “*logical and systematic*” interpretation of the Statute.<sup>42</sup>

In its “*logical and systematic*” interpretation of Article 2, the Tribunal found that *Ay* is “*widely contended*” as a correct understanding of the Geneva Conventions.<sup>43</sup> Similarly, the tribunal emphasized that the content of the Geneva Conventions “*might appear ambiguous*” and “*be open for some debate*”.<sup>44</sup> Differentiation is also here used as a tool of

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<sup>35</sup> *Prosecutor v. Dusko Tadic*, premise 74.

<sup>36</sup> *Prosecutor v. Dusko Tadic*, premise 75.

<sup>37</sup> *Prosecutor v. Dusko Tadic*, premise 76.

<sup>38</sup> “*reductio ad absurdum*.” Encyclopædia Britannica. 2008. Encyclopædia Britannica Online. 12 Nov. 2008 <<http://search.eb.com/eb/article-9062992>>.

<sup>39</sup> *Prosecutor v. Dusko Tadic*, premise 65.

<sup>40</sup> *Prosecutor v. Dusko Tadic*, premise 77.

<sup>41</sup> *Prosecutor v. Dusko Tadic*, premise 78.

<sup>42</sup> *Prosecutor v. Dusko Tadic*, premise 79 onwards.

<sup>43</sup> *Prosecutor v. Dusko Tadic*, premise 79.

<sup>44</sup> *Ibid*.



inserting an understanding favorable to the tribunal, while at the same time recognizing arguments *de lege lata*. By differentiating between the Geneva Conventions' regulation of jurisdiction and substantive law, the tribunal liberated the question of jurisdiction from the Geneva Conventions.<sup>45</sup> This led the tribunal to introduce a third possible understanding of Article 2, *Az*, which shares *Ay*'s view on the substantive law and *Ax*'s view on jurisdiction.<sup>46</sup> However, a conclusion on the preference of *Az* is followed by an *obiter dictum*, strongly favouring *Ax*.<sup>47</sup> The *obiter dictum* signalizes future change in the substantive law, a change introduced already later in the same decision, under the tribunal's interpretation of Article 3.

The tribunal's understanding of Article 3 can be seen as following the same pattern as its decision on how Article 2 should be interpreted.

By arguing that Article 3 was restricted to international conflicts [*By*], the counsel for the Defence structured his argument in a similar fashion as was done with relation to Article 2.<sup>48</sup> However, the tribunal rejected *By* as being "*an unnecessary narrow reading of the Statute*" that did not deserve any "*closer scrutiny*".<sup>49</sup> It was not even considered, as *Ay* was under Article 2. That *By* was not considered must be seen in relation to the tribunal liberating the question of jurisdiction from the Geneva Conventions under Article 2.<sup>50</sup> By liberating the question of jurisdiction from the Geneva Conventions, the tribunal was no longer bound by the Geneva Conventions' jurisdictional restriction to international armed conflicts.

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<sup>45</sup> *Prosecutor v. Dusko Tadic*, premises 80-82.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Prosecutor v. Dusko Tadic*, premise 83.

<sup>48</sup> *Prosecutor v. Dusko Tadic*, premise 86.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Prosecutor v. Dusko Tadic*, premises 80-82.

Instead, the tribunal concentrated on arguments championing an interpretation similar to *Ax* under Article 2. In its discussion under Article 3, the tribunal achieved a very wide literal interpretation of Article 3 [*Bx*], through a series of differentiations.<sup>51</sup> *Bx* implies jurisdiction over all breaches of international humanitarian law, and relates in content to the *obiter dictum* under Article 2.<sup>52</sup>

The series of differentiations commence in the tribunal's reading of Article 3 as a general clause concerning "*violations of laws and customs of war*", which is not restricted to the listings of offences in its text.<sup>53</sup> Furthermore, "*violations of laws and customs of war*" was interpreted to refer to the traditional concept of "*armed conflicts*" in the Geneva Conventions and to the concept of "*international armed conflict*" in the Hague Conventions.<sup>54</sup> The latter was interpreted into the contemporary concept of "*international humanitarian law*".<sup>55</sup> This enabled the tribunal to conclude that it had jurisdiction over all breaches against international humanitarian law and to emphasize the opinions related to the *obiter dictum*. In this way, an opinion was labeled both as *de lege ferenda* and *de lege lata* in the same decision. It also enabled the tribunal to enforce norms from a very wide substantive scope.

A conclusion on the preference of *Bx* is here defended as "*borne out of the debates of the Security Council*"<sup>56</sup>, based on the purpose of the tribunal and on the political opinion of the Western powers.<sup>57</sup> The wide conclusion was further defended as being limited, as it was limited to cover only "*serious violations*" and to the jurisdiction of the other provisions of the Statute.<sup>58</sup>

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<sup>51</sup> *Prosecutor v. Dusko Tadic*, premise 87.

<sup>52</sup> *Prosecutor v. Dusko Tadic*, premise 83.

<sup>53</sup> *Prosecutor v. Dusko Tadic*, premise 87.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Prosecutor v. Dusko Tadic*, premise 88.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Prosecutor v. Dusko Tadic*, premise 90.

By following this complex argumentative structure, the tribunal enabled itself to apply resolving generalities.

## 2.3 Avoiding clear theorizing

### 2.3.1 Claim

In *Prosecutor v. Dusko Tadic*, the tribunal did not consider alternative perceptions of the substantive law in detail. In fact, opposing the tribunal's own reading were either bluntly dismissed or ridiculed as a "*reductio ad absurdum*" argument. By doing this, it can be claimed that the tribunal *avoided clear theorizing*. By *avoiding clear theorizing*, I refer to a superficial type of argumentation that lacks profound theorizing on the substantive legal question at hand.

In the following, examples of how the tribunal avoided clear theorizing will be given.

### 2.3.2 Findings supporting the claim

In premise 76 of the decision the tribunal, while interpreting Article 2 of the Statute, dismissed an argument based on a claim that silence from the Security Council implies that the matter has not been decided on. This done by labeling it as an "*reductio ad absurdum*" argument.<sup>59 60</sup>

The tribunal constructed the "*reductio ad absurdum*" argument by assuming a situation where the conflict was classified as international by the Security Council and where only the civilians of one of the conflicting parties were considered to belong to a new state.<sup>61</sup>

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<sup>59</sup> *Prosecutor v. Dusko Tadic*, premise 76.

<sup>60</sup> See section 2.2 for definition

<sup>61</sup> *Prosecutor v. Dusko Tadic*, premise 76.

The absurd outcome would thereby be a situation where only one group of civilians was protected by the Geneva Conventions.<sup>62</sup>

From an analytical point of view, this can be regarded as a misunderstanding of both the argument made by the Defence and that of the Prosecutor.<sup>63</sup> In this way, the argument is based on false premises. The assumed argument was to be based either on a situation where the conflict was deemed internal or a situation where it was classified as international with a similar recognition of new nationalities for the respective civilians.<sup>64</sup> Had the argument been based on formally correct premises, it could not be seen as “*reductio ad absurdum*”.

By illustrating the argument of the counsel for the Defence in this fashion, the tribunal gives the impression of theorizing. However, when given closer scrutiny, the presentation “*reductio ad absurdum*” is clearly a rhetorical move made use of to avoid clear theorizing on the matter.

In its interpretation of Article 3 of the Statute, the tribunal avoided clear theorizing in a different manner; by simply rejecting the Defence’s argument. While the argument is more thoroughly investigated with regard to Article 2 (“*reductio ad absurdum*”), the tribunal commences its examination of Article 3 by rejecting it without any further reasoning.<sup>65</sup>

By following a similar line of argumentation as under Article 2, the counsel for the Defence continued to argue from a position bearing similarity to what will later be presented as the rule-approach to international law. The argument of the Defence was thus summarized by the tribunal: “*Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is in casu an internal armed conflict; therefore, to the extent that the jurisdiction of the International*

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<sup>62</sup> Ibid.

<sup>63</sup> *Prosecutor v. Dusko Tadic*, premise 65.

<sup>64</sup> Ibid.

<sup>65</sup> *Prosecutor v. Dusko Tadic*, premise 86.

*Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia.*”<sup>66</sup>

While bearing in mind that the counsel for the Defence more or less succeeded with this approach in relation to Article 2, it comes as a surprise that a similar approach here is rejected in one sentence as “*based on an unnecessarily narrow reading of the Statute*” that “*does not bear close scrutiny.*”<sup>67</sup> It illustrates, in my view, that the tribunal followed a different approach to international law than the counsel for the Defence.

## 2.4 Perceiving that law should be understood as a reflection of society

### 2.4.1 Claim

To perceive that law should be understood as a reflection of society is an ideal known from the age of enlightenment.<sup>68</sup> Three aspects of the tribunal’s argumentation give grounds to claim that it perceives that international law should reflect the opinion of the international society: It applies a wide range of sources, it emphasizes the opinion of the members of the UN Security Council and it adapts the substantive law to changes of opinion within the international society through an *obiter dictum*.

### 2.4.2 Findings supporting the claim

The application of a wide range of sources can be understood to correspond with an ideal where law should reflect society; the wider range of sources given relevance the more representative the law is of international society.

Another aspect that promotes the notion that the tribunal holds law’s reflection of society as an ideal, is the tribunal’s emphasis on the opinion of the members of the Security Council. Not only is the “*will*” of the Security Council given relevance. Similarly, the

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Rousseau; *Du contrat social ou Principes du droit politique* (1762).

opinion of its respective members is regarded as relevant for the tribunal.<sup>69</sup> This can be regarded as giving relevance to the opinion of members of the international society. Implicitly, this can be understood as a reference to that *the content of the law should reflect the opinions of its subjects*.

The mentioned notion is confirmed when a basis for change in the substantive law is introduced via an *obiter dictum*.<sup>70</sup> This shows that the content of the substantive law is attempted changed through jurisprudential decisions, and can be understood as a will to adapt the material law to the development in the international society. Thus, one can conclude that the tribunal *emphasized that the content of the law should reflect the opinion of the international society*.

## 2.5 Emphasizing formal legal sources

### 2.5.1 Claim

Each conclusion in *Prosecutor v. Dusko Tadic* is based on a literal interpretation of the Statute. In other words, the tribunal bases its decision on a source of formal validity. There are grounds to say that the Statute is interpreted so wide that it must be regarded as a disguise for other sources of less formal validity. Without considering such a claim, it nonetheless proves that the tribunal *emphasized formal legal sources*.

This perception is further strengthened when regarding the tribunal's structuring of its argumentation. In the decision, the structural patterns of argumentation serve another purpose, namely to include content from formally less valid sources into a source of higher formal validity. This is the same pattern as described under 2.2. To support this claim, I will give a presentation on how the tribunal commences its discussion on the substantive law and on how the formal validity of the main sources is emphasized in its conclusion.

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<sup>69</sup> *Prosecutor v. Dusko Tadic*, premises 83 and 88.

<sup>70</sup> *Prosecutor v. Dusko Tadic*, premise 83.

## 2.5.2 Findings supporting the claim

The tribunal's discussion on Article 2 begins with a literal interpretation of the Statute.<sup>71</sup> The tribunal focuses on a contextual reading of the Statute, since a literal reading of the provision in Article 2 by itself would prove fruitless in relation to achieving jurisdiction<sup>72</sup>. This is done by comparing the content of Article 2 to that of Article 3. From this comparison, the tribunal draws the conclusion that "*the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of the conflict rather than both of them.*"<sup>73</sup> The tribunal consequently finds that it "*will therefore consider the object and purpose behind the enactment of the Statute.*"<sup>74</sup> This is chosen "*In order better to ascertain the meaning and scope of these provisions.*"<sup>75</sup>

The comparison described above can be understood as a means of differentiating the two provisions. Furthermore, by creating doubt of the reading of the two provisions, the tribunal finds a reason to find inspiration in abstract thoughts and ideas. These abstract thoughts and ideas are later interpreted into the content of Article 2 through an *obiter dictum* as arguments *de lege ferenda*.<sup>76</sup>

However, the tribunal concludes that Article 2 of the Statute and its reference to "*protected persons or property*" is understood to be restricted only to international conflicts. It states that the tribunal's "*interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2.*"<sup>77</sup> The conclusion is based solely on the sources of higher formal validity.

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<sup>71</sup> *Prosecutor v. Dusko Tadic*, premise 71.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Prosecutor v. Dusko Tadic*, premise 83.

<sup>77</sup> *Ibid.*

As mentioned under 2.2, the narrow reading of Article 2 serves a purpose: To interpret Article 3 into being a general clause.

The tribunal also begins its discussion on Article 3 with a literal interpretation.<sup>78</sup>

Inconsistent with its previous holding in the decision, the tribunal starts its interpretation with stating what the interpretation will result in: “*A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all “violations of the laws or customs of war”; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.*”<sup>79</sup> This signals that the tribunal reads Article 3 to have a wide content.

Similar to its interpretation of Article 2, the tribunal stresses the importance of a contextual reading of the Statute, as “*one must take account of the context of the Statute as a whole*”.<sup>80</sup> In constructing its conclusion, the tribunal emphasizes that the “*purpose and tasks*” of the tribunal refers to “*serious violations*” of international humanitarian law.<sup>81</sup> Furthermore, it is found “*appropriate to take the expression “violations of the laws or customs of war” to cover serious violations of international humanitarian law.*”<sup>82</sup> The jurisdictional limitation to “*serious violations*” must be seen as a minor restriction to the conclusion from their argumentation. The tribunal thus harmonizes the content of other sources with the provision’s written content before stating its conclusion.

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<sup>78</sup> *Prosecutor v. Dusko Tadic*, premise 87.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Prosecutor v. Dusko Tadic*, premise 90.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*



The tribunal thus concludes on a rather wide reading of Article 3 in that “*it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2*”.<sup>83</sup>

In other words, with the limitation to “*serious violations*”, the tribunal inserts into Article 3 every aspect of international humanitarian law except for what followed a very narrow interpretation of Article 2. In this way, Article 3 functions as a formal disguise for all other sources of international humanitarian law.

## 2.6 A norm’s absolute binding force is implicit

### 2.6.1 Claim

To take a norm’s absolute binding force for granted is an argumentative trait closely linked, in my view, to the trait of avoiding clear theorizing. To question a norm’s binding force leads to a discussion on normative value.<sup>84</sup> In *Prosecutor v. Dusko Tadic*, the normative value of international humanitarian norms is not discussed. This can be understood to mean that the tribunal regards *international humanitarian norms’ absolute binding force to be implicit*.

### 2.6.2 Findings supporting the claim

It should be noted that the substantive question in the Tadic case concerned jurisdiction. The question of jurisdiction does not concern a norm’s normative value, but rather whether there are grounds to enforce norms. However, in *Prosecutor v. Dusko Tadic*, international humanitarian norms are enforced without discussing their normative value. This suggests that the ICTY did not question the normative value of international humanitarian norms.

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<sup>83</sup> *Prosecutor v. Dusko Tadic*, premise 89.

<sup>84</sup> Koskeniemi (2005), p. 184.

## 2.7 Summary/Data

Six general traits of an international humanitarian argument can be extracted on the basis of sections 2.1 to 2.6. They will serve as *data* in a comparison with the different hypotheses that follow in section 3. The set of *data* contains short descriptions of each general trait referring to its content.

The *data* is as follows:

- Operating with a wide scope of international legal sources.*
- Applying resolving generalities.*
- Avoiding clear theorizing.*
- Emphasizing that law should reflect the international society.*
- Emphasizing formal legal sources.*
- A norm's absolute binding force is implicit.*

## 3 Modern doctrines of international law

### 3.1 Doctrines

When inducing a norm from the vast amount of sources in international law<sup>85</sup>, a jurist is faced with primarily two challenges: The first being the question of which sources that are relevant. The second question concerns how much weight each source shall be given when harmonizing the content of the relevant sources. In “*From Apology to Utopia*”, Martti Koskeniemi has rephrased these two questions into being a *question of limiting international laws material scope* and a *question of the normative value of a source*.<sup>86</sup>

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<sup>85</sup> *Sources of international law* (2000), p. 46.

<sup>86</sup> Koskeniemi (2005), p. 184.

In the following, four different approaches to solve these questions will be presented. Each approach is called a doctrine. Each doctrine presents different premises for considering the material scope of international law and the normative value of a source. The four doctrines must not be understood as being a fixed and permanent classification on how international lawyers argue, but are merely meant to demonstrate “*typical ways of trying to construct better doctrines by lawyers who have been relatively “theoretical” and consistent.*”<sup>87</sup>

My aim with this part of the thesis is to illustrate how the four doctrines represent different perspectives on how to understand the content of international law. Furthermore, I attempt to generalize certain traits of how an argument would be structured from the different perspectives. The presented traits will serve as four alternative *hypotheses* on how to structure a “*typical*”<sup>88</sup> international humanitarian argument.

### 3.1.1 Background for determining modern doctrines and their general traits

Before further explaining the content of the four doctrines, viewing the doctrines from a historical background could prove valuable in order to understand why there is a need to “*construct better doctrines*”.<sup>89</sup> International law has always been perceived differently. While some lawyers have deducted norms from natural laws, others have emphasized State sovereignty and remained focused on international law’s obligatory nature. With the exception of early discourses on natural laws, international law was in essence for a long time primarily a medium for Kings and Emperors to legitimize the righteousness of their actions.<sup>90</sup> However, at the beginning of the 20<sup>th</sup> century and in correspondence with an increasingly united world, a greater need for regulations amongst States arose. With this

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<sup>87</sup> Koskenniemi (2005), p. 189.

<sup>88</sup> See section 1.2.

<sup>89</sup> Koskenniemi (2005), p. 189.

<sup>90</sup> E.g. Grotius; *The freedom of the seas: or the right which belongs to the dutch to take part in the East-Indian trade: a dissertation* (1633).

came a serious demand for professional international lawyers and multilateral treaties. International law had turned professional, as stated by Koskenniemi.<sup>91</sup>

Despite great efforts in diplomacy, the professionalists did not manage to prevent two devastating world wars. This led to a lack of confidence in international law and a crisis within the international legal community. To some extent this crisis still exists. The failure of professionalism inspired a new school of international lawyers, aiming to solve the crisis in international law. A common trait to this new school of lawyers is that they try to distance themselves from the weaknesses connected with professionalism. The main criticism against professionalism was, according to Koskenniemi, that the professionalist way of regarding international law was either *apologetic* or *utopian*<sup>92</sup>. The criticism of being *apologetic* was primarily raised against professionalists' emphasis on State sovereignty, while the label *utopian* was connected to their beliefs in natural laws, arbitration and conferences on keeping the peace.<sup>93</sup> Modernists seek, in Koskenniemi's view, to use this critique and, through differentiation, create a new doctrine containing neither.<sup>94</sup>

As a consequence, international lawyers try to avoid being labeled as "apologist" or "utopian". However; "[n]o position, argument or doctrine is by itself utopian or apologist. These characterizations relate to a position only as a result of interpretation, projection from an opposing perspective – another view about what it is for an argument to be "subjective" or "objective".<sup>95</sup> In other words, the fear of being labeled may prove hard to eliminate, since the labeled terms are used in a superficial manner and depend on the object of criticism as well as the eye of the beholder. This new wave in international law is characterized as *modernist*.

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<sup>91</sup> Koskenniemi (2005), p. 1-4.

<sup>92</sup> Koskenniemi (2005), p. 165.

<sup>93</sup> Koskenniemi (2005), p. 161-163.

<sup>94</sup> Koskenniemi (2005), p. 165.

<sup>95</sup> Koskenniemi (2005), p. 164.

When categorizing the modernist doctrines, Koskenniemi emphasizes how the *concreteness* and *normativity* of international law is regarded according to each typical perspective. Furthermore, he has found that the modernists differentiated themselves from professionalism through assuming a difference between a descending and an ascending argument.<sup>96</sup> An argument based on natural laws is an example of a descending structure and implies a risk of utopian critique. On the other hand, an argument based on a strict view on State sovereignty, is an example of an ascending structure and might give basis for apologist criticism.<sup>97</sup> As a summary: *“Each dispute involves, in one way or another, the opposition between a descending and an ascending way to argue about order and obligation and varying emphasis on the ideas of normativity and concreteness.”*<sup>98</sup>

Thus, typical structures of argumentation by international lawyers are categorized into four versions of modernist doctrines: the rule-approach, the policy-approach, the skeptical position and the idealist position. These approaches will now be dealt with in more detail.

### 3.1.2 The rule-approach/ Hypothesis I

#### 3.1.2.1 Presentation of the rule-approach

By championing the professionalists emphasis on State sovereignty, and at the same time abandoning their more abstract ideas such as natural laws, a typical rule-approach lawyer conceives their view of international law by focusing on its obligatory nature.

A rule-approach implies the following of a perspective inspired by domestic law. It emphasizes the formality of legal sources and on the functioning of law-creating processes. From this perspective, objectivity is reached through induction. This is in contrast to

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<sup>96</sup> Koskenniemi (2005), p. 170-171.

<sup>97</sup> Koskenniemi (2005), p. 168.

<sup>98</sup> Ibid.

deductivism and eclectism, as “[l]aw is created by legal subjects – not by deductions from abstract principles.”<sup>99</sup>

Through this perspective, international law can be perceived as normatively strong and binding. The rule-approach draws a distinction between law and politics and stresses the need for order and predictability in international law. A norm is valid as law or arguments *de lege lata* only if it binds as a standard. Other aspects of State behaviour are viewed as *de lege ferenda* arguments or political opinions.<sup>100</sup>

Yet, the rule-approach enables only a fraction of State behaviour to be revealed.<sup>101</sup> In its essence, the rule-approach represents a perspective from which law is normatively strong, but restricted in scope.

#### 3.1.2.2 General traits of a rule-approach argument/Hypothesis I

All the general traits of a doctrine compose a *hypothesis*, containing short descriptions related to the content of each general trait. The *hypothesis* will be compared with the *data* from section 2.7 in section 4.

Hypothesis I has the following content:

- Emphasis on a norm’s formal legal basis
- Inductive argumentation
- Emphasis on State sovereignty and order in the international law-creating process

#### 3.1.3 The policy-approach/ Hypothesis II

##### 3.1.3.1 Presentation of the policy-approach

A common factor for both the rule-approach and the policy-approach is that their perspectives are based on premises deriving from social sciences. However, while the rule-

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<sup>99</sup> Koskenniemi (2005), p. 194.

<sup>100</sup> Koskenniemi (2005), p. 184

<sup>101</sup> Ibid.

approach extracts its premises from legal science, the policy-approach receives its premises from political science. A distinction between the two is based on the fact that each science has its own “*conceptual schemes through which isolated facts of behavior are linked together and given meaning.*”<sup>102</sup> Drawing his inspiration from “conceptual schemes” of political science, an international lawyer, arguing from a policy-approach, would downplay traditional formal demands to law in order to “[see] law in every “process””.<sup>103</sup>

A main point of criticism, that the followers of the rule-approach make against the policy-approach, is that it confuses the relationship between law and politics in “*an apologist manner*”, which is “*useful only to legitimize de facto situations*”.<sup>104</sup> On the contrary, a critique that a policy-approach lawyer can make against the rule-approach is that their strict evaluation of State behaviour is far from the reality of how States actually behave, giving international law an “*abstract and unreal binding force*”.<sup>105</sup> It is thus not based on reality and is therefore utopian.

According to the policy-approach, international law’s normative value varies and relates to the factual authoritativeness of legal decision. Authoritative decision-making takes and has relevance at all levels of international conduct. This gives international law a very wide scope.<sup>106</sup>

Moreover, a premise for the policy-approach argument is that contemporary normative processes have shifted “*from formal, legally binding accords into other forms of commitment*”.<sup>107</sup> In order to better evaluate international law, focus is therefore concentrated on the degree of effective control that can be associated with every norm.

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<sup>102</sup> Koskeniemi (2005), p. 183.

<sup>103</sup> Koskeniemi (2005), p. 184.

<sup>104</sup> Koskeniemi (2005), p. 184-185.

<sup>105</sup> Koskeniemi (2005), p. 185.

<sup>106</sup> Koskeniemi (2005), p. 201.

<sup>107</sup> Koskeniemi (2005), p. 203.

However, due to “*the lack of common values and the individualized nature of situations in international life*”<sup>108</sup>, it is given that the degree of effective control will vary.

Hence, the policy-approach lawyer’s claim to objectivity is based on scientific assumptions, more specifically on observable decision-making, authority and effectiveness.<sup>109</sup> Ironically, by following the policy-approach lawyer’s method of proving international law’s independence from politics, one will simultaneously prove the relevance of politics.<sup>110</sup>

### 3.1.3.2 General traits of a policy-approach argument/Hypothesis II

Hypothesis II has the following content:

- Objectivity is based on assumptions from political sciences
- Focus on observable decision-making, authority and effectiveness
- International law has an individualized nature
- A rule’s formal validity is unimportant

### 3.1.4 The skeptical position/ Hypothesis III

#### 3.1.4.1 Presentation of the skeptical position

The skeptical position is a different approach, which has mostly been developed among political scientists. Even though the skeptical position shares the same view on international law’s restricted material scope as the rule-approach, an international lawyer advocating from the former position would nonetheless also be skeptical towards international law’s binding force. Hence, from this perspective, international law can be perceived as neither having a wide material scope nor having a strong normative character. In essence, this implies a denouncement of international law as a legal discipline.<sup>111</sup>

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<sup>108</sup> Ibid.

<sup>109</sup> Koskeniemi (2005), p. 204.

<sup>110</sup> Koskeniemi (2005), p. 208.

<sup>111</sup> Koskeniemi (2005), p. 197.



Even though the skeptical position agrees with the normative ideal, advocated by the rule-approach, that there should be a clear distinction between law and politics, a skeptic is doubtful about the possibilities of its international realization. They believe that this is due to the fact that international law has neither a uniform nor an absolute binding nature.<sup>112</sup>

Another factor that distances the skeptical position from the previous doctrines lies in their claim that other lawyers, especially rule-approach lawyers, disregard sociological and ethical factors as vital elements when defining an international legal study.<sup>113</sup> By disregarding these factors, the other lawyers would fail in understanding the true nature of international law. For instance, rule-approach lawyers believe that the concept of sanctions depends on the existence of a rule, while skeptical position lawyers argue that sanctions' dependence on a rule is irrelevant. Instead, from a sociological perspective, they focus on the likelihood of a sanction following the breaking of a norm, thus, regarding sanctions only as an observable fact. Furthermore, a skeptic would also claim that a rule's binding force is relative to the political context of each situation.<sup>114</sup> This is based on the observation that the sociological contexts of international rules are highly individualized, and depends on common interests or balance of power to support it.<sup>115</sup> From this perspective, a rule has no reality outside of this context.

### 3.1.4.2 General traits of an argument from the skeptical position/Hypothesis III

Hypothesis III has the following content:

- International law has neither a wide material scope, nor a strong normative character
- International law has neither a uniform, nor an absolute binding nature
- A rule's normative value is individual and varies with the specific social context of each situation

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<sup>112</sup> Ibid.

<sup>113</sup> Koskenniemi (2005), p. 198.

<sup>114</sup> Koskenniemi (2005), p. 199.

<sup>115</sup> Ibid.

-Sanctions are relative to political context

### 3.1.5 The idealist position/ Hypothesis IV

#### 3.1.5.1 Presentation of the idealist position

The idealist lawyers advocate perhaps a more cheerful position towards international law. A *Leitmotif*<sup>116</sup> behind the idealist position is to combine the virtues of both the rule- and policy-approach. What is implicit here is that every aspect of State behavior can be seen to represent international law and that all these expressions of State behavior have binding force. From this perspective, international law can be seen as being normatively strong and as containing a wide material scope.<sup>117</sup>

The idealists' criticism of the other three doctrines is their acceptance of international law's contradictory nature: that the law cannot be concrete and normative at the same time.<sup>118</sup>

Each of the three attempts to preserve one part of international law's nature, while downplaying the other. This makes it impossible for lawyers to stay permanently within their chosen doctrine.<sup>119</sup> A rule- or a policy-approach lawyer would consequently be forced towards adapting a more moderate view, unless he became a cynic.<sup>120</sup>

The idealists believe that a more moderate view would lead these lawyers in the direction of idealism, which is, in essence, a variation of the modern program in its original form.<sup>121</sup> Law that exists in and is created by the United Nations is of interest of idealists, especially

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<sup>116</sup> German for *main motive*.

<sup>117</sup> Koskenniemi (2005), p. 185.

<sup>118</sup> Koskenniemi (2005), p. 209.

<sup>119</sup> Koskenniemi (2005), p. 210.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

in areas such as human rights law, economic law and environmental law.<sup>122</sup> Idealists believe that this has vastly enlarged international law's material scope.<sup>123</sup>

A norm's binding force is assumed to lie implicit in its existence and is therefore not questioned.<sup>124</sup> This is one reason, making it difficult to analyze an idealist argument. Additionally, the lack of "*express theorizing*" and the serving of "*intangible generalities*" further complicate this.<sup>125</sup> Nevertheless, two basic assumptions are believed to give basis for an idealist argument: The first being that "*law is understood as a reflection of society*", and the second being a critical position towards "*existing structures of international dominance*".<sup>126</sup> While the first assumption gives reason to the idealists' view on international law's material scope, the latter gives explanation to the idealists' attitude and their belief in international law's unquestionable and implicit absolute binding force.<sup>127</sup>

Consequently, an idealists' test of law is whether it corresponds with the objectives of the international society.<sup>128</sup> In other words, it is not a question of whether it can be based on a traditional reading of formal sources, but instead a question of whether "*it corresponds to the nature of present international society and peoples' cognition of it in their juridical conscience.*"<sup>129</sup> By emphasizing the hypothetical "*universal international conscience*"<sup>130</sup> instead of the expressed wishes of States, an idealist argument would result in "*no difference between de lege ferenda and de lege lata in this respect.*"<sup>131</sup> Thus, enabling the

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Koskeniemi (2005), p. 211.

<sup>127</sup> Ibid.

<sup>128</sup> Koskeniemi (2005), p. 212.

<sup>129</sup> Koskeniemi (2005), p. 214.

<sup>130</sup> Koskeniemi (2005), p. 213.

<sup>131</sup> Koskeniemi (2005), p. 214.

international lawyer to be released from his dependence on the will of the world's States, and to be able to perceive and apply what is labeled "new" international law.<sup>132</sup>

From the perspectives of the other doctrines, the idealist position is criticized as utopian and for applying natural laws in disguise. The only difference between natural laws and the idealists' "scientific" foundation for its arguments is that the foundation is "*verifiable by recourse to the actual living conditions, needs and interests of peoples.*"<sup>133</sup>

### 3.1.5.2 General traits of an argument from the idealist position/Hypothesis IV

Hypothesis IV has the following content:

- The material scope of international law is very wide
- Law is understood as a reflection of society
- A rule's absolute binding force is unquestionable
- The material law's content is based on the objectives of peoples and the universal international conscience
- Avoidance of clear theorizing and application of resolving generalities

## **4 Does one doctrine have dominating influence over the structuring of an international humanitarian argument? – An evaluation of hypothesis and data**

In this part of the essay, the hypothesis presented in part 3 will be tried against the data presented in part 2. I will commence with comparing the general traits of an international humanitarian argument as found in the analysis of the Tadic case (data) to the general traits of the four modernist doctrines (hypothesis). This will be followed up by an evaluation of how the data match the different hypothesis. Finally, a conclusion on whether one of the

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<sup>132</sup> Koskeniemi (2005), p. 213.

<sup>133</sup> Koskeniemi (2005), p. 214.

doctrines has dominating influence over the structuring of an international humanitarian argument will be presented.

#### 4.1 Comparison between the general traits of an international humanitarian argument and the general traits of modernist doctrines

Below, each of the general traits to an international humanitarian argument will be compared to the general traits of the four doctrines. This is a comparison between data and the four hypotheses.

##### 4.1.1 The appliance of a wide range of international legal sources

Implicit in applying a wide range of international legal sources is that it is argued from a position that regards international law to have a wide material scope. This perspective corresponds to both the policy-approach position and the idealist position, as they both perceive international law to have a wide material scope. Hence, this general trait of an international humanitarian argument matches a general trait relevant to hypothesis II as well as hypothesis IV.

##### 4.1.2 The appliance of resolving generalities

By interpreting a written text to have a wide and abstract content, the appliance of resolving generalities must be said to be a general trait to an international humanitarian argument. This general trait corresponds with that of an argument made from an idealistic position. Thus, there is a match with hypothesis IV.

##### 4.1.3 Avoiding clear theorizing

Avoiding clear theorizing is an argumentative structure that enables an international lawyer to avoid a theoretical discussion with concern to the material question at hand. This general traits of an international humanitarian argument is similar to that of an argument made from an idealist position. Once again, a match between data and hypothesis IV is found.

#### 4.1.4 Adapting the content of the material law to the opinion of the international society

By adapting the content of the material law to the opinion of the international society, an international humanitarian argument can be said to correspond both with general traits of the policy-approach position and the idealist position. The *focus on observable decision-making, authority and effectiveness* from the rule approach position, could lead an international lawyer to adapt the content of the material law to the opinion of the international society. Furthermore, this general trait corresponds to the opinion that *law is understood as a reflection of society*, a general trait to an argument made from an idealist position. Hence, this matches this general trait to hypotheses II and IV.

#### 4.1.5 Emphasizing formal legal sources

Implicit in emphasizing the formal demand to a legal source is that an argument is structured after the formal value of a source. This is a general trait of an argument made from a rule-approach. A match exists here between the data and hypothesis I.

#### 4.1.6 Regarding a norm's absolute binding force as implicit

Regarding a norm's absolute binding force as implicit is an argumentative trait that is connected to the trait of avoiding clear theorizing. This general trait of an international humanitarian argument also corresponds with a general trait to an argument made from an idealist position; that *a norm's absolute binding force is unquestionable*. This is another match between data and hypothesis IV.

### 4.2 Evaluation of the hypothesis

In the comparison between data and hypothesis, matches were found between the general traits of an international humanitarian argument and the general traits of arguments made from the rule-approach position (hypothesis I), the policy-approach position (hypothesis II) and the idealist position (hypothesis IV). No match was found between a typical humanitarian argument and the skeptical position (hypothesis III), hence hypothesis III is already considered forsaken.

#### 4.2.1 Hypothesis I, the rule-approach

The comparison reveals a 25 per cent match between the general traits of an international humanitarian argument and the general traits of a rule-approach argument. The 25 per cent similarity is calculated by dividing the amount of common general traits with the total number of general traits of a rule-approach argument. In case of the rule-approach, one match is found (emphasis on the formality of a legal source). This is one out of four possible. A 25 per cent match shows that the rule-approach doctrine has had influence on the structuring of an international humanitarian argument.

However, one could argue that the emphasis on a source's formal validity is different in the international humanitarian argument than it would be from a rule-approach position. In an international humanitarian argument, the emphasis on a source's formal validity is performed in a superficial manner. By emphasizing sources of minor formal validity in interpreting a source of major formal validity, then the formal validity of the main source is undermined. In this way, one source's formal validity is used as a disguise to emphasize sources of less formal validity. This illustrates that the 25 per cent match found here is relative.

The relativity of the 25 per cent similarity between data and hypothesis I creates doubt about the correctness of the finding. However, it does not create doubt about the rule-approach having some influence on an international humanitarian argument.

#### 4.2.2 Hypothesis II, the policy-approach

By sharing two general traits with an international humanitarian argument, the policy-approach position has a 40 per cent match with an international humanitarian argument. The percentage of similarity is calculated in the same way as under 4.2.1.<sup>134</sup> This shows that the policy-approach position has influence on the structuring of an international humanitarian argument.

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<sup>134</sup>  $2/5=0.4$ .

However, both of the common traits can also be said to be traits common to the idealist position. This reveals a similarity between the policy-approach and the idealistic position, and casts doubt onto whether an international humanitarian argument is influenced by both of the doctrines or solely one. As will be shown under 4.2.3, the idealistic position has a higher percentage of similarity to an international humanitarian argument than the policy-approach. This can imply that only the idealist position influence the structuring of an international humanitarian argument.

Nevertheless, a 40 per cent match does imply that the policy-approach position may have had influence over the structuring of an international humanitarian argument. This means that Hypothesis II must be kept, but cannot be considered proven.

#### 4.2.3 Hypothesis IV, the idealist position

The comparison shows an 80 per cent match between the general traits of an international humanitarian argument and the general traits of an argument made from the idealist position. Four out of the five general argumentative traits to an idealist argument are found in the general traits of an international humanitarian argument. These numbers show a close connection between the idealist position and a typical international humanitarian argument.

That *the material law's content is based on the objectives of peoples and the universal international conscience*, is the only general trait of an idealist position that is not found in the data. However, this general trait can be said to lie implicit in the core of international humanitarian law. The core of international law is to ensure the well-being of mankind and to prosecute severe crimes against mankind. When listing hypothetical common objectives of peoples, the well-being of every man would ace that list. Similarly, prosecuting severe crimes against mankind can be regarded as based upon a universal international conscience. This implies that this general trait could have been found in a more thorough analysis of an international humanitarian argument, and that a 100 per cent match might have been found.



Nevertheless, the numbers are clear in their verdict and prove what others long have assumed<sup>135</sup>: That the idealist position has dominating influence over the structuring of an international humanitarian argument. Hypothesis IV is considered proven.

#### 4.3 Conclusion

The idealist doctrine on how to perceive international law has dominating influence over the structuring of an international humanitarian argument.

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<sup>135</sup> Koskenniemi (2005), p. 210.

## 5 List of sources

### Judgments:

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|-----------------------------------|--|
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| -Prosecutor v. Slobodan Milosovic | International Tribunal for the Former Yugoslavia, the Hague (IT-02-54)   |

### Treaties and Statutes:

- |                     |  |
|---------------------|--|
| -Geneva Conventions | Geneva Conventions of August 12 <sup>th</sup> 1949   |
| -Hague Convention   | Hague Convention of October 19 <sup>th</sup> 1907  |
| -ICTY Statutes      | Statutes of the International Tribunal for the Former Yugoslavia, adopted May 25 <sup>th</sup> 1993 by Security Council Resolution 827 |
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## **6 Appendix**

### **6.1 Article 2 and 3 of the ICTY Statute**

Article 2 of the Statute of the International Tribunal provides:

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages."

Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

## 6.2 Extracts from *Prosecutor v. Dusko Tadic*

### "C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the amicus curiae briefs submitted by Juristes sans Frontières and the Government of the United States of America, to whom it expresses its gratitude.

8. Appellant has submitted two successive Briefs in appeal. The second Brief was late but, in the absence of any objection by the Prosecutor, the Appeals Chamber granted the extension of time requested by Appellant under Rule 116.

The second Brief tends essentially to bolster the arguments developed by Appellant in his original Brief. They are offered under the following headings:

- a) unlawful establishment of the International Tribunal;
- b) unjustified primacy of the International Tribunal over competent domestic courts;
- c) lack of subject-matter jurisdiction.

The Appeals Chamber proposes to examine each of the grounds of appeal in the order in which they are raised by Appellant”

#### ”IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council

determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

#### A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and



repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter Geneva Convention I); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter Geneva Convention III); see also Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter Geneva Convention IV).)

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. This construction is implicit in Article 6, paragraph 2, of the Convention, which stipulates that:

"[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations." (Geneva Convention IV, art. 6, para. 2 (Emphasis added).)

Article 3(b) of Protocol I to the Geneva Conventions contains similar language. (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, art. 3(b), 1125 U.N.T.S. 3 (hereinafter Protocol I).) In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. Similarly, certain language in Protocol II to the Geneva Conventions (a treaty which, as we shall see in paragraphs 88 and 114 below, may be regarded as applicable to some aspects of the conflicts in the former Yugoslavia) also suggests a broad scope. First, like common Article 3, it explicitly protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, art. 4, para.1, 1125 U.N.T.S. 609 (hereinafter Protocol II). Article 2, paragraph 1, provides:

"[t]his Protocol shall be applied [ . . . ] to all persons affected by an armed conflict as defined in Article 1."(Id. at art. 2, para. 1 (Emphasis added).)

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(Id. at art. 2, para. 2.)

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in

the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

## B. Does The Statute Refer Only To International Armed Conflicts?

### 1. Literal Interpretation Of The Statute

71. On the face of it, some provisions of the Statute are unclear as to whether they apply to offences occurring in international armed conflicts only, or to those perpetrated in internal armed conflicts as well. Article 2 refers to "grave breaches" of the Geneva Conventions of 1949, which are widely understood to be committed only in international armed conflicts, so the reference in Article 2 would seem to suggest that the Article is limited to international armed conflicts. Article 3 also lacks any express reference to the nature of the underlying conflict required. A literal reading of this provision standing alone may lead one to believe that it applies to both kinds of conflict. By contrast, Article 5 explicitly confers jurisdiction over crimes committed in either internal or international armed conflicts. An argument a contrario based on the absence of a similar provision in Article 3 might suggest that Article 3 applies only to one class of conflict rather than to both of them. In order better to ascertain the meaning and scope of these provisions, the Appeals Chamber will therefore consider the object and purpose behind the enactment of the Statute.

### 2. Teleological Interpretation Of The Statute

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in

which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects. (See Transcript of the Hearing on the Motion on Jurisdiction, 26 July 1995, at 47, 111.)

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were internal, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the

aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflicts. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions condemning the presence of JNA forces in Bosnia-Herzegovina and Croatia as a violation of the sovereignty of these latter States. See, e.g., S.C. Res. 752 (15 May 1992); S.C. Res. 757 (30 May 1992); S.C. Res. 779 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of these many resolutions did the Security Council explicitly state that the conflicts were international.

In each of its successive resolutions, the Security Council focused on the practices with which it was concerned, without reference to the nature of the conflict. For example, in resolution 771 of 13 August 1992, the Security Council expressed "grave alarm" at the "[c]ontinuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and

ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property." (S.C. Res. 771 (13 August 1992).)

As with every other Security Council statement on the subject, this resolution makes no mention of the nature of the armed conflict at issue. The Security Council was clearly preoccupied with bringing to justice those responsible for these specifically condemned acts, regardless of context. The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that, as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well.

75. The intent of the Security Council to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General of 3 May 1993 and by statements of Security Council members regarding their interpretation of the Statute. The Report of the Secretary-General explicitly states that the clause of the Statute concerning the temporal jurisdiction of the International Tribunal was

"clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter Report of the Secretary-General).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict



contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (Id. at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(id.)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would

be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

78. With the exception of Article 5 dealing with crimes against humanity, none of the statutory provisions makes explicit reference to the type of conflict as an element of the crime; and, as will be shown below, the reference in Article 5 is made to distinguish the nexus required by the Statute from the nexus required by Article 6 of the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg. Since customary international law no longer requires any nexus between crimes against humanity and armed conflict (see below, paras. 140 and 141), Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal. As previously noted, although Article 2 does not explicitly refer to the nature of the conflicts, its reference to the grave breaches provisions suggest that it is limited to international armed conflicts. It would however defeat the Security Council's purpose to read a similar international armed conflict requirement into the remaining jurisdictional provisions of the Statute. Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict. To illustrate, the Security Council has repeatedly condemned the wanton devastation and destruction of property, which is explicitly

punishable only under Articles 2 and 3 of the Statute. Appellant maintains that these Articles apply only to international armed conflicts. However, it would have been illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct about which they were concerned, only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both.

Thus, the Security Council's object in enacting the Statute - to prosecute and punish persons responsible for certain condemned acts being committed in a conflict understood to contain both internal and international aspects - suggests that the Security Council intended that, to the extent possible, the subject-matter jurisdiction of the International Tribunal should extend to both internal and international armed conflicts.

In light of this understanding of the Security Council's purpose in creating the International Tribunal, we turn below to discussion of Appellant's specific arguments regarding the scope of the jurisdiction of the International Tribunal under Articles 2, 3 and 5 of the Statute.

### 3. Logical And Systematic Interpretation Of The Statute

#### (a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

#### (a) wilful killing;

- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g., [Amicus Curiae] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadic, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, U.S. Amicus Curiae Brief), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the

grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2: "[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."

[ . . . ]

[T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

[ . . . ]

[T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal. The grave breaches system of the Geneva Conventions establishes a twofold system: there is on the one hand an enumeration of offences that are regarded so serious as to constitute "grave breaches"; closely bound up with this enumeration a mandatory enforcement mechanism is set up, based on the concept of a duty and a right of

all Contracting States to search for and try or extradite persons allegedly responsible for "grave breaches." The international armed conflict element generally attributed to the grave breaches provisions of the Geneva Conventions is merely a function of the system of universal mandatory jurisdiction that those provisions create. The international armed conflict requirement was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents. State parties to the 1949 Geneva Conventions did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory universal jurisdiction involved in the grave breaches system.

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast,

those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that: "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law

include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (see above, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see *id.* at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

84. Notwithstanding the foregoing, the Appeals Chamber must conclude that, in the present state of development of the law, Article 2 of the Statute only applies to offences committed within the context of international armed conflicts.

85. Before the Trial Chamber, the Prosecutor asserted an alternative argument whereby the provisions on grave breaches of the Geneva Conventions could be applied to internal conflicts on the strength of some agreements entered into by the conflicting parties. For the



reasons stated below, in Section IV C (para. 144), we find it unnecessary to resolve this issue at this time.

(b) Article 3

86. Article 3 of the Statute declares the International Tribunal competent to adjudicate violations of the laws or customs of war. The provision states:

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is in casu an internal

armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered qua customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no

longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (id., at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

88. That Article 3 does not confine itself to covering violations of Hague law, but is intended also to refer to all violations of international humanitarian law (subject to the limitations just stated), is borne out by the debates in the Security Council that followed the adoption of the resolution establishing the International Tribunal. As mentioned above, three Member States of the Council, namely France, the United States and the United Kingdom, expressly stated that Article 3 of the Statute also covers obligations stemming from agreements in force between the conflicting parties, that is Article 3 common to the Geneva Conventions and the two Additional Protocols, as well as other agreements entered into by the conflicting parties. The French delegate stated that:

"[T]he expression 'laws or customs of war' used in Article 3 of the Statute covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the

offences were committed." (Provisional Verbatim Record of the 3217th Meeting, at 11, U.N. Doc. S/PV.3217 (25 May 1993).)

The American delegate stated the following:

"[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:

Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (Id., at p. 15.)

The British delegate stated:

"[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (Id., at p. 19.)

It should be added that the representative of Hungary stressed:

"the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (Id., at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as

"grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point see below, para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "serious violations" of international humanitarian law" (See Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International

Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

93. The above interpretation is further confirmed if Article 3 is viewed in its more general perspective, that is to say, is appraised in its historical context. As the International Court of Justice stated in the Nicaragua case, Article 1 of the four Geneva Conventions, whereby the contracting parties "undertake to respect and ensure respect" for the Conventions "in all circumstances", has become a "general principle [. . .] of humanitarian law to which the Conventions merely give specific expression." (Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (Merits), 1986 I.C.J. Reports 14, at para. 220 (27 June) (hereinafter Nicaragua Case). This general principle lays down an obligation that is incumbent, not only on States, but also on other international entities including the United Nations. It was with this obligation in mind that, in 1977, the States drafting the two Additional Protocols to the Geneva Conventions agreed upon Article 89 of Protocol I, whereby:

"In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter." (Protocol I, at art. 89 (Emphasis added).)

Article 3 is intended to realise that undertaking by endowing the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law."

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